

(26,305)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 838.

W. E. CAREY, PLAINTIFF IN ERROR,

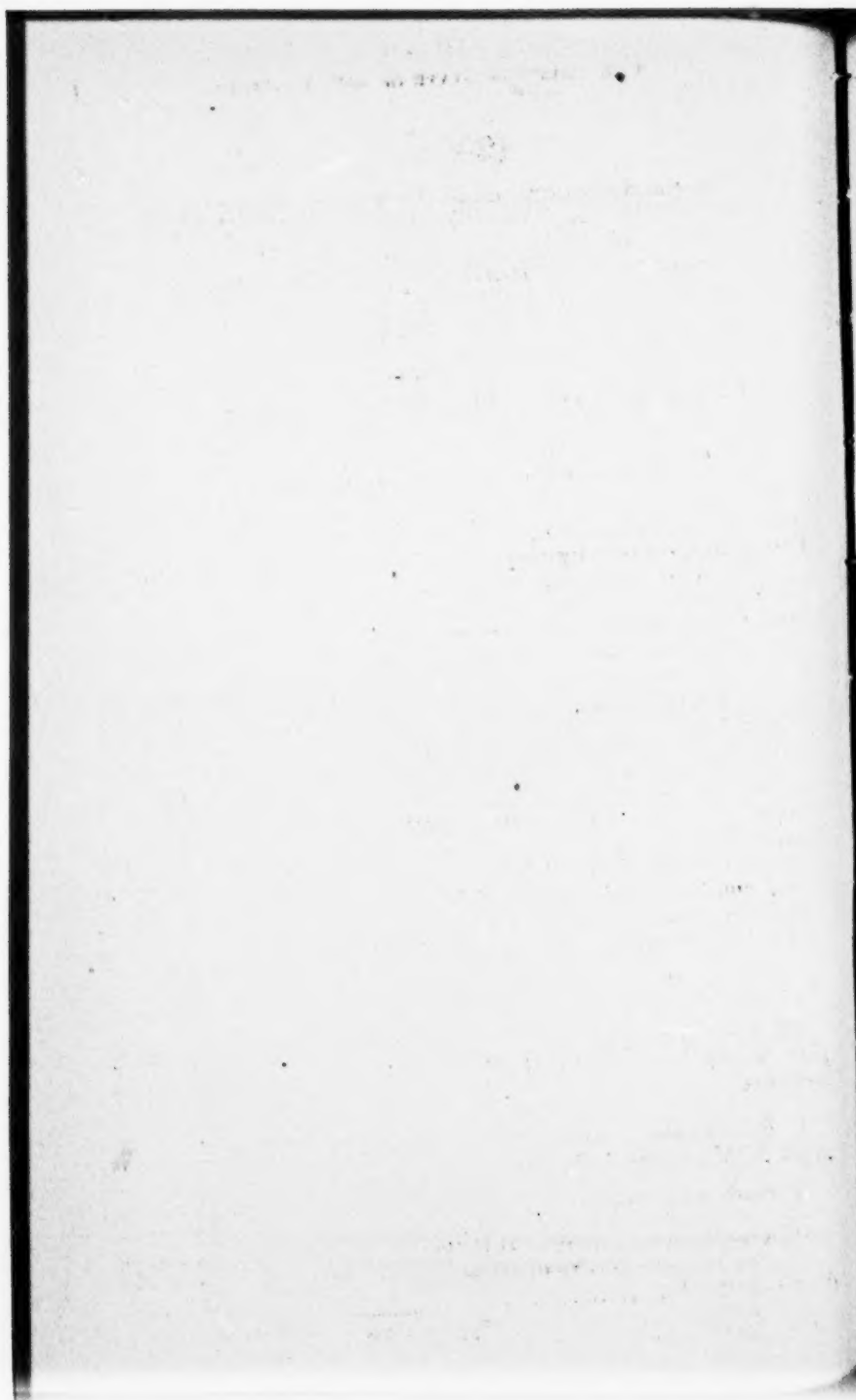
vs.

THE STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH
DAKOTA.

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1 In the Supreme Court of the State of South Dakota, April Term, A. D. 1917.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,

vs.

W. E. CAREY, Defendant and Appellant.

Appellant's Brief.

(Abstract and Argument.)

On April 10th, 1916, information, properly verified by the State's Attorney of Douglas County, was presented and filed against the Defendant, all the charging part of which is as follows:

"That W. E. Carey, late of said County, Yeoman, on the 19th day of November in the year of our Lord One Thousand Nine Hundred and Fifteen, at the County of Douglas, and State of South Dakota

"aforesaid, did unlawfully ship and convey and caused to be

2 "shipped and transported by common carrier to a point with-

"out the State of South Dakota fifteen game birds, viz; ducks

"as follows: On the said 19th day of November, 1915, the said De-

"fendant, W. E. Carey did unlawfully, at Armour, Douglas County,

"South Dakota, deliver to Wells Fargo and Company, at said City

"of Armour, for shipment fifteen game birds, viz; wild ducks, and

"billed the same to Charles Comiskey at Chicago, Illinois, which

"game birds were seized by a Deputy State Game Warden while in

"transit at Tripp, South Dakota, and said Wells Fargo and Company

"then and there being an Express Company and a common carrier

"of goods, contrary, etc."

To this information Defendant entered a plea of not guilty.

Trial.

On April 11th, 1916, the action came on regularly for trial and a jury having been impaneled and sworn the following proceedings were had.

I. P. JOHNSON, a witness for the State duly sworn and interrogated by Mr. Addie as follows:

Q. State your name.

Defendant thereupon objected to the introduction of any evidence under such information and asked the court to rule and

3 decide as follows:

Objections to Evidence at Opening of Case.

First. That the facts stated in the information are insufficient to and do not constitute a public offense against the laws of this State.

Second. That the act of Congress of 1913 has placed all migratory game birds under Federal protection and has thereby repealed all state laws theretofore existing with regard to the same.

Third. That such act expressly provides that only the laws that were in force as to non-migratory birds should remain in force and gave the State power to enact laws in the future with regard to migratory birds, after the Department of Agriculture should provide, by suitable rules and regulations, for carrying the act of Congress into effect.

Fourth. That no such power has been exercised by the Legislature of South Dakota since the Federal Game Law took effect.

Which objection was over-ruled by the court and to which ruling Defendant duly excepted.

State's Evidence.

The State thereupon introduced evidence showing that the Defendant on Nov. 19th, 1915, delivered a box, containing fifteen dead wild ducks (Mallards, Red Heads, Teal, Blue Bills, 4 ect.) to the Agent of Wells Fargo and Company at Armour,

South Dakota, which box was addressed to Charles Comiskey at Chicago, Illinois, the usual bill of lading and way-bill being issued therefor to the Defendant, which way-bill stated such Express Company had received such box containing poultry which it agreed to transport from Armour, South Dakota, to said consignee at Chicago, Illinois. Such box of ducks was placed on the east bound train from Armour. The express messenger for Wells Fargo and Company on said train delivered such box of ducks to that Company's Agent at Tripp, South Dakota, who placed it on a truck when a Deputy Game Warden sei-ed the same claiming such shipment was illegal.

Statement as to Evidence.

The above constitutes all the evidence introduced by either party upon the trial of said action.

Requested Instructions.

Thereupon the Defendant asked the Court to advise the Jury that under the evidence which had been introduced in this case no offense against the laws of the State had been shown to have been committed. That the law of the State, so far as it attempts to prohibit a shipment of game, if it ever had any validity was 5 abrogated by the act of Congress approved March 4th, 1913; that no claim is made that the birds in question were killed in what

is designated as the closed season, and any attempt by the State to interfere therewith is an attack on interstate commerce and void.

This request was over-ruled and to which ruling the Defendant duly excepted.

Verdict.

The Jury thereupon returned a verdict finding the Defendant guilty.

Notice of Intention.

Thereafter and within the time provided by law the Appellant duly served on the State's Attorney a notice of intention to move for a new trial on the following statutory grounds:

1. Errors of law occurring at the trial and excepted to by Defendant.

2. Insufficiency of evidence to justify the verdict.

3. That the verdict is against law, which notice stated that said motion would be made upon a settled record which was therewith served upon Respondent, and for the reasons set forth in the specification of errors thereto attached.

Settled Record.

6 Thereupon and within the time provided by law the Defendant did procure from the Official Stenographer a transcript of all testimony of the proceedings in the case, certified to as correct, and did attach thereto specifications of errors, which are the same as the respective assignment of errors in this printed record hereinafter set forth except as to the last assignment with regard to refusing Appellant a new trial which event had not taken place at that time; and did serve a copy of such transcript with a copy of such specifications upon the adverse party; and thereupon no amendments being offered the Court did, within the time and manner provided by law, attach to such record a certificate to the effect that such record contained the judgment roll together with a full, true and correct transcript of the proceedings had at the trial and the evidence received and rejected, so far as the same is necessary for the full determination of the errors specified; and that the same contains all the material evidence received upon the trial and thereupon and thereby did make a settled record in said action in accordance with the laws of this State, all of the material parts of which so far as necessary to a full and complete understanding of the errors assigned is printed herein.

Motion for New Trial.

7 Thereafter and within the time provided by law the Appellant did, on said settled record as aforesaid and for the reasons set forth in assignment of errors and hereinafter printed, duly move the court for a new trial, and thereupon the court made and entered the following:

Order Denying New Trial.

In the above entitled action, it is ordered that the defendant's motion for a new trial be and the same is hereby denied to which ruling defendant duly excepts.

By the Court,

R. B. TRIPP, *Judge.*

Attest:

T. J. WOHLFORD, *Clerk.*

Appeal.

Thereafter and within the time provided by law the appellant in this action duly appealed from the order refusing him a new trial by serving upon the Attorney General, the Clerk of said court and the State's Attorney of said, Douglas County, a notice of appeal as required by law, and did perfect the same by filing such notice with the Clerk together with proof of service thereof, and by depositing the regular appeal fees, as required by Chapter 146 of the laws of 1915.

Assignment of Errors.

Appellant specifies the following assignment of errors which bear the same numbers and are the same as the corresponding specification of errors and which are found on pages 37 and 38 of the settled record, and says the trial court erred to his prejudice as follows:

1. In over-ruling the defendant's objection to the introduction of any evidence on the part of the prosecution and in refusing to rule that the information filed herein does not state facts sufficient to constitute a public offense for the reasons set forth in this Brief, Ante page 3.

2. In over-ruling defendant's motion made at the close of the case asking the court to advise the jury that the evidence did not show the commission of a public offense for the reasons set forth in this brief Ante pages 4-5.

The evidence is insufficient to sustain the verdict because:

(a) There is no evidence that the defendant did ship, convey or cause to be shipped or transported by a common carrier, as alleged in the information, to a point without the State the wild ducks mentioned therein.

(b) That the evidence does not disclose who the alleged Wells Fargo Company is, whether an individual or corporation, in what business, if any, it is engaged, and does not show it is engaged in either intra or interstate commerce, nor that it was such a person such a shipment as alleged in the information could have made.

(c) That the evidence fails to disclose that there was any such person as Charles Comiskey at Chicago, to whom such shipment could have been made.

(d) That under Section 29, Chapter 240 Laws of 1909, if such section is still in force, it only prohibits shipping of such ducks to some person, and no person as the alleged consignee is shown to exist.

(3) In over-ruling defendant's motion for a new trial.

10 In the Supreme Court of the State of South Dakota, April Term, A. D. 1917.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,
vs.

W. E. CAREY, Defendant and Appellant.

Appeal from the Circuit Court of Douglas County, South Dakota.

Hon. R. B. Tripp, Judge.

Respondent's Additional Statement and Brief.

Respondent submits an additional statement on the matters contained in the settled record which it deems material for the consideration of the court, viz: The settled record shows that eight witnesses were sworn and testified at the trial of the case. (S. R. pp. 1 to 27.)

11 After making allowance for objections or motions of counsel and rulings of the court at least twenty typewritten pages of the settled record are devoted to giving a transcript of the testimony in this case.

We call the court's attention to this in view of the statement of the evidence in appellant's brief on pages 3 and 4, and the further statement in folio 9, page 4 of appellant's brief to the effect that such statement "constitutes all the evidence introduced by either party on the trial of said action."

12 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,
vs.

W. E. CAREY, Defendant and Appellant.

Appeal from the Circuit Court of Douglas County.

Honorable R. B. Tripp, Judge.

Opinion filed Dec. 13, 1917.

13 Walker & Gurley, Attorneys for Appellant; Kirby, Kirby & Kirby, of Counsel.

C. C. Caldwell, Attorney General; Byron S. Payne, Assistant Attorney General; John W. Addie, State's Attorney, Attorneys for Respondent.

POLLEY, J.:

Appellant in this case was tried and convicted upon an information charging him with the shipment of fifteen wild ducks to a point without the state, in violation of the provisions of §29 Ch. 240 of the Laws of 1909. Several reasons why the conviction is illegal are urged by appellant, but the principal ground relied upon is that the Act of Congress approved March 4, 1913,—Ch. 145, Stat. at Large (Comp. Stat. 1913, §8837) commonly known as the Federal Migratory Game Bird Law, placed all migratory game birds under Federal protection, and thereby suspended all state laws in regard to the same subject; while, on the other hand, it is contended by the Attorney General that the said Federal Act is unconstitutional and did not have the effect claimed for it by the appellant. Said act provides that:

"All migratory game and insectivorous birds shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to the regulations hereinafter provided therefor."

But it nowhere in the record appears that the ducks in question were killed in violation of this law or of any regulation made thereunder. So far as appears from the record, said ducks were lawfully killed and lawfully in the possession of the defendant at the
14 time of the alleged shipment. Therefore it is immaterial to the issues in this case whether the said Federal act is constitutional or not.

By the provisions of §29 Ch. 240 Laws of 1909, it is made unlawful to ship wild ducks or to cause them to be shipped by any private or common carrier, to any person either within or without the state, and it is immaterial, under the provisions of this act, whether the killing of such ducks was lawful or unlawful.

Appellant does not question the power of the legislature to enact Ch. 240 Laws of 1909, except so far as it conflicts with the said Federal act. And that the enactment of said Chapter 240 is within the police power of the legislature is well established by the State and Federal courts: *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *Geer v. Conn.*, 161 U. S. 519, 16 Sup. Ct. Rep. 600.

It is contended by appellant that the evidence is insufficient to support the verdict. The information charges that the ducks in question were delivered for shipment to Wells, Fargo & Company, an express company and a common carrier of goods, to be carried from Armour, in this state, to Chicago, Illinois. The evidence shows that said ducks were received by Wells, Fargo & Company at Armour, and, by that company, carried as far as Tripp, South Dakota, where they were seized by a game warden. The particular point made by appellant is that the evidence does not show what or who Wells, Fargo & Company is. This is wholly immaterial. Section 29, Chapter 240 Laws of 1909 makes it unlawful to "carry or cause to be shipped or transported by common or private carrier, to any person, either within or without the state," * * * wild ducks of any variety. The evidence shows that the company named in the

15 information was a carrier, either private or common, and that it did actually accept and carry said wild ducks a part of the way from the place of shipment to the place of consignment. This is sufficient under the law.

Lastly, appellant contends that there is no evidence to show that there was any such person as the consignee named in the information, or any other person capable of receiving such shipment if it went to Chicago. This contention is without merit. The information charges, and the evidence shows, that the shipment in question was consigned to Charles Comiskey, at Chicago, Illinois. Whether there was such a person as Charles Comiskey or whether he was capable of receiving such shipment is wholly immaterial. The gravamen of the offense consists in the delivery of the ducks to a carrier, private or common, for the purpose of being shipped to any person at some other place. The name "Charles Comiskey" is the name of a natural person, and, in the absence of proof to the contrary, he will be presumed to be capable of receiving said consignment. The evidence is amply sufficient to support the verdict.

Finding no error in the record, the judgment and order appealed from are affirmed.

[Endorsed:] 4110.

16 File No. 4110.

STATE OF SOUTH DAKOTA, ss:

In the Supreme Court, October Term, A. D. 1917.

Present: John Howard Gates, Presiding Judge; Chas. S. Whiting, Ellison G. Smith, J. H. McCoy, and Samuel C. Polley, Judges of said Court, and the officers thereof.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,

vs.

W. E. CAREY, Defendant and Appellant.

This action coming on to be heard at the April, A. D. 1917, Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and without oral argument, and the Court having advised thereon and filed its decision in writing.

It is considered, ordered and adjudged, that the judgment and order of the Circuit Court, within and for Douglas County, appealed from herein, be and the same are hereby affirmed.

And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, That — have and re-

cover of the — costs and disbursements on this appeal, expended, taxed and allowed at —.

By the Court,

JOHN HOWARD GATES,
Presiding Judge.

Attest:

[SEAL.] E. F. SWARTZ, *Clerk*,
By — — —, *Deputy Clerk*.

[Endorsed:] (File No. 4110.) In Supreme Court, State of South Dakota, October Term, 1917. State of South Dakota, Plaintiff and Respondent, vs. W. E. Carey, Defendant and Appellant. Supreme Court. State of South Dakota. Filed Dec. 13, 1917. E. F. Swartz, Clerk. Remittitur sent down —. Recorded in Judgment Book 10, Page 314.

17 STATE OF SOUTH DAKOTA:

In the Supreme Court.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,

vs.

W. E. CAREY, Defendant and Appellant.

Petition for Writ of Error.

To the Honorable the Presiding Judge of the Supreme Court of the State of South Dakota:

Now comes the above named defendant, W. E. Cary, and complains and shows to this Court that in the records and proceedings had in the above entitled action and also in the rendition of the judgment herein, in the Supreme Court of the State of South Dakota, on the 13th day of December, 1917, being the highest Court of the said State in which a decision in the suit could be had, manifest error hath happened, to the great damage of your petitioner, in that there is in said suit drawn in question the validity of a statute of and an authority exercised under the United States and the decision of the said Supreme Court is against their validity, and there is likewise drawn in question, the validity of a statute of, and authority exercised under the State of South Dakota, on the ground of their being repugnant to the Constitution, treaties and laws of the United States and said decision is in favor of their validity, as will appear more fully from the Assignment of Errors hereto attached and filed herewith, and thereby your petitioner has been deprived of his rights, liberty and property, without due process of law.

18 Wherefore, now at this time, within three months after the entry of said judgment, complained of, your petitioner prays: That you allow unto him Writ of Error from the Supreme Court of the United States to the Supreme Court of South Dakota,

in order that the matters and things, of which complaint is made, be reviewed and justice be done, and that thereupon an order be made fixing the amount of bond, citation issued and such other orders and processes as may cause the error complained of to be corrected by said Supreme Court.

Dated this 4th day of January, 1918.

JOS. KIRBY,

Attorney and of Counsel for W. E. Carey.

And now, to wit, on this 7th day of January, 1918, on motion of Joe Kirby of Kirby, Kirby & Kirby, Attorneys for said petitioner, W. E. Carey, and upon the foregoing petition for writ of error, together with Assignment of Errors, it is ordered that a Writ of Error be and is hereby allowed, which Writ shall act as a Superseades, upon the petitioner giving bond in the sum of \$500.00.

CHAS. S. WHITING,

Presiding Judge.

[Endorsed:] 4110. (1.) State of South Dakota. In the Supreme Court. State of South Dakota vs. W. E. Carey. Petition for and order allowing writ of error. Filed January 9, 1918. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy. Supreme Court, State of South Dakota. Filed Jan. 10, 1918. E. F. Swartz, Clerk.

19 STATE OF SOUTH DAKOTA:

In the Supreme Court.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,

vs.

W. E. CAREY, Defendant and Appellant.

Assignment of Errors and Prayer for Reversal.

To the Honorable the Presiding Judge of the Supreme Court of the State of South Dakota:

Now comes the defendant, W. E. Carey, in the above entitled action and in connection with his petition for Writ of Error, presents this assignment of errors which he avers occurred to his detriment on said trial:

(1). That by the information filed against this defendant in this action and upon which he was placed on trial, he is accused with having on the 19th day of November, 1915, in Douglas County, South Dakota, shipped and caused to be conveyed and transported by common carrier from a point within the State of South Dakota to a point without the State of South Dakota, fifteen wild ducks.

(2). That said information is based solely and only upon and is alleged to be a violation of Section 29 of Chapter 240, of the Session Laws of South Dakota, 1909, which was passed and approved

on March 8th of that year, which section so far as material is as follows:

"No person shall hunt, take, kill, ship, convey or cause to be shipped or transported by common or private carrier, to any person within or without the State, any wild duck of any variety, except that wild duck of any variety may be killed and had in possession between the 10th day of September and the 10th day of April following."

20 (3). By Act of Congress Approved March 4th, 1913 (37 Stat. L. 847), Congress assumed exclusive jurisdiction over this class of Migratory birds, allowing the states to legislate alone on non-migratory birds, and to subsequently adopt laws to render more effective regulations, thereafter to be adopted by the Department of Agriculture, and thereby suspended all state laws upon said subject, and especially upon said Chapter 240 of the Session laws of 1909, of South Dakota.

(4). That at the time as mentioned in said information, when this defendant is accused of having committed a crime against the laws of the State of South Dakota, the Department of Agriculture had in accordance with said Act of Congress, duly prepared regulations and caused the same to be engrossed and approved by the President of the United States, to the effect that it was lawful to hunt and kill wild duck in the territory covered by the State of South Dakota, during all of the month of November of said year.

(5). That since said regulations by the Department of Agriculture relative to game birds, including wild duck, became operative, the State of South Dakota has enacted no laws to aid in rendering same effective and has passed no laws other than those above mentioned in these assignments.

(6). That the Circuit Court of Douglas County, being the Court before which this action was originally tried, erred in holding said information charging the defendant with the commission of a public offense and in refusing to sustain his objections made thereto, and to discharge him from further proceedings thereunder.

(7). That the Supreme Court of this State erred in affirming the conviction of this defendant in the trial court and in refusing to reverse the judgment of said court and grant him his liberty.

Prayer for Reversal.

21 Now comes the said defendant, W. E. Carey, for the reasons appearing above, as well as in the records and proceedings herein, and respectfully asks the Honorable Supreme Court of the United States that the action of the Supreme Court of South Dakota be reversed and that he may have such relief as may be just and proper.

Respectfully submitted,

KIRBY, KIRBY & KIRBY,
JOS. KIRBY,

Attorney- and of Counsel for W. E. Carey.

[Endorsed:] 4110. (2). State of South Dakota vs. W. E. Carey. Assignment of Errors and Prayer for Reversal. Supreme Court, State of South Dakota. Filed Jan. 10, 1918. E. F. Swartz, Clerk.

22 UNITED STATES OF AMERICA:

In the Supreme Court.

W. E. CAREY, Plaintiff in Error,

vs.

STATE OF SOUTH DAKOTA, Defendant in Error.

Writ of Error.

The President of the United States to the Honorable the Supreme Court of the State of South Dakota, Greeting:

Whereas, it has been made to appear to us, by the petitioner herein and the records and proceedings, as also in the rendition of the judgment of a plea, which is in said Supreme Court before you, in an action where the State of South Dakota is plaintiff and respondent and W. E. Carey is defendant and appellant, manifest error hath happened to the great damage of the said W. E. Carey, as by his complaint appears, we being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the petitioner aforesaid, in this behalf do command you if judgment be therein given that you shall send the records and proceedings aforesaid, with all things concerning the same to this, the Supreme Court of the United States at Washington, D. C. together with this writ, so that you have the same at Washington, D. C. within sixty days from the date hereof, in the Supreme Court of the United States to be then and there held, that the records and proceedings aforesaid be inspected, that the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

23 Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 9th day of January, 1918.

OLIVER J. PENDAR,

*Clerk of the District Court of the United States
for the District of South Dakota.*

Allowed by

CHAS. S. WHITING,

*Presiding Judge of the Supreme Court
of the State of South Dakota.*

[Endorsed:] 4110. (3). State of South Dakota vs. W. E. Carey. Writ of Error. Supreme Court, State of South Dakota. Filed Jan. 10, 1918. E. F. Swartz, Clerk.

24 UNITED STATES OF AMERICA:

In the Supreme Court.

W. E. CAREY, Plaintiff in Error,

vs.

STATE OF SOUTH DAKOTA, Defendant in Error.

Undertaking on Writ of Error.

Whereas, the said W. E. Carey has heretofore procured, or is about to procure, a Writ of Error, to remove an action prosecuted against him in the Supreme Court of the State of South Dakota, wherein the State of South Dakota is Plaintiff and Respondent, and the said W. E. Carey is Defendant and Appellant, to the Supreme Court of the United States, and the Presiding Judge of said Court having fixed the amount of bond required at Five Hundred Dollars, in order that such Writ of Error may act as a supersedeas,

Now, Therefore, We, the said W. E. Carey as Principal, and the Western Surety Company as Surety, do undertake and agree, in the sum of Five Hundred (\$500.00) Dollars, to and with the State of South Dakota, that he, the said W. E. Carey, shall prosecute his Writ to effect, and if he fail to make his plea good, answer all damages and costs.

Dated this ninth day of January, A. D. 1918.

W. E. CAREY,

By JOS. KIRBY,
His Attorney.

[Corporate Seal Western Surety Company, South Dakota.]

WESTERN SURETY COMPANY,

By J. L. SCALLAN,
General Manager.

Approved:

CHAS. S. WHITING,
Presiding Judge, Supreme Court, South Dakota.

[Endorsed:] 4110. (5.) In Supreme Court of the United States. W. E. Carey, Plf. in Error, vs. State of South Dakota Dft. in Error. Undertaking. Supreme Court, State of South Dakota. Filed Jan. 10, 1918. E. F. Swartz, clerk.

24½

Western Surety Company
(Trustees and Indemnity),

Home Office for South Dakota, Sioux Falls, S. D.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Be it Known, That on this 9th day of January 1918, before me, the undersigned, a Notary Public, in and for said county and state, personally appeared J. L. Scallan known to me to be the General Manager of the Western Surety Company, the corporation that is described in and that executed the within undertaking, and acknowledged to me that such corporation executed the same.

I further certify that there was exhibited to me the original certificate of authority issued by the Commissioner of Insurance, of the State of South Dakota; to said Western Surety Company, and that the following is a full, true and complete copy of such Certificate.

Company's Certificate of Authority.

Whereas, The Western Surety Company, a corporation organized under the laws of South Dakota, has filed in this office a sworn statement exhibiting its condition and business for the year ending December 31, 1916 conformably to the requirements of the laws of his state regulating the business of insurance; and

Whereas, the said company has filed in this office a duly certified copy of its charter; a statement containing the names of its stockholders and made the deposit of securities provided by law in compliance with the requirements of the insurance laws aforesaid.

Now, Therefore, I, M. Harry O'Brien, Commissioner of Insurance, of the State of South Dakota, pursuant to the provisions of said laws, do hereby certify that the above named company is fully empowered through its authorized agents to transact its appropriate business of Fidelity, Surety, Employer's Liability, Title Guarantee and Burglary Insurance in this state according to the laws thereof, until the last day of February, A. D., 1918.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this 1st day of March, 1917.

M. HARRY O'BRIEN,
Commissioner of Insurance.

[Seal Wayne C. Foster, Notary Public, South Dakota.]

WAYNE C. FOSTER,
Notary Public.

25 UNITED STATES OF AMERICA:

In the Supreme Court.

W. E. CAREY, Plaintiff in Error,

vs.

STATE OF SOUTH DAKOTA, Defendant in Error.

Citation.

The President of the United States of America to the State of South Dakota and the Honorable Attorney General of South Dakota, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within sixty days from date hereof, pursuant to writ of error filed in the Clerk's Office of the Supreme Court of the State of South Dakota, in this action, being an action where judgment was rendered affirming the judgment and decision of the Circuit Court of Douglas County, South Dakota in an action brought by the State of South Dakota against the said W. E. Carey, and show cause, if any there be, why the judgment rendered against the said petitioner in error, mentioned in said writ, should not be corrected and why speedy justice should not be done to the petitioner in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court this 10th day of January, 1918.

CHAS. S. WHITING,

*Presiding Judge Supreme Court of
the State of South Dakota.*

[Endorsed:] 4110. (5.) In Supreme Court of United States. W. E. Carey, Plf. in Error, vs. State South Dakota, Dft. in Error. Citation. Supreme Court, State of South Dakota. Filed Jan. 10, 1918. E. F. Swartz, Clerk. Due, timely and personal service of the within admitted this 10th day of January, 1918. Clarence C. Caldwell, Attorney General of South Dakota.

26 UNITED STATES OF AMERICA:

In the Supreme Court.

W. E. CAREY, Plaintiff in Error,

vs.

STATE OF SOUTH DAKOTA, Defendant in Error.

Præcipe for Record to Be Returned to Supreme Court.

To the Honorable Clerk of the Supreme Court, South Dakota:

In accordance with the Writ of Error which has been issued and lodged in your office, in this action, you are hereby required to forward to the Clerk of the Supreme Court of the United States, at Washington, D. C., in return with said writ and this *Præcipe*, the following parts of the record only:

(1) All matters and things comprising the abstract of the evidence and proceedings contained in the printed record (appellant's brief), down to the Assignment of Errors contained on Page 7 thereof, omitting therefrom such matters as are purely local identification, such as the words "Appellant's Brief—Abstract of Argument," and figures in parenthesis that relate only to pages of the settled record, etc.

- (2) Judgment and Opinion of the Supreme Court.
- (3) Assignment of Errors and Prayer for Reversal.
- (4) Citation.
- (5) Undertaking or Bond.

JOS. KIRBY,
JNO. H. KIRBY,
THOS. H. KIRBY,

Attorneys for Plaintiff in Error.

[Endorsed:] 4110. (7.) United States of America. In the Supreme Court. W. E. Carey, Plaintiff in Error, vs. State of South Dakota, Defendant in Error. *Præcipe for Record to Be Returned to Supreme Court.* Supreme Court, State of South Dakota. Filed Jan. 10, 1918. E. F. Swartz, Clerk. Due, timely and personal service of the within admitted this Tenth day of January, A. D. 1918. Clarence C. Caldwell, Attorney General, South Dakota.

27 UNITED STATES OF AMERICA:

In the Supreme Court.

W. E. CAREY, Plaintiff in Error,

vs.

STATE OF SOUTH DAKOTA, Defendant in Error.

Præcipe for Record to Be Returned to Supreme Court.

To the Honorable Clerk of the Supreme Court, South Dakota:

In accordance with the Writ of Error which has been issued and lodged in your office, in this action, you are hereby required to forward to the Clerk of the Supreme Court of the United States, at Washington, D. C., in return with said writ and this Præcipe, in addition to the portions of the record designated in the præcipe of the plaintiff in error, all matters and things comprising the additional abstract of the evidence and proceedings contained in the additional statement from the record, as printed in respondent's additional statement and brief, on page 1 and page 2 thereof, down to the word "argument."

CLARENCE C. CALDWELL,

Attorney for Defendant in Error.

Due and timely service of the within præcipe is hereby admitted this 16 day of January, 1918.

KIRBY, KIRBY, KIRBY,

Attorneys for Plaintiff in Error.

27½ [Endorsed:] 4110. (8.) W. E. Carey, Plaintiff in Error, vs. State of South Dakota, Defendant in Error. Præcipe of Defendant in Error. Supreme Court, State of South Dakota. Filed Jan. 18, 1918. E. F. Swartz, Clerk. "

28 STATE OF SOUTH DAKOTA, Plaintiff and Respondent,

vs.

W. E. CAREY, Defendant and Appellant.

I, E. F. Swartz, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of that portion of the record, including the opinion and judgment, of the Supreme Court of the State of South Dakota in the above entitled action, as specified in the præcipe of both plaintiff in error and defendant in error, as the same now remains of record in this court.

And I further certify that the petition for writ of error, assignment of errors and prayer for reversal, writ of error, undertaking, citation, præcipe for record of plaintiff in error and præcipe for record of defendant in error, are the original papers entered and filed in this court in said cause.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, this 19th day of January, A. D. 1918.

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ, *Clerk.*

Endorsed on cover: File No. 26,305. South Dakota Supreme Court. Term No. 838. W. E. Carey, Plaintiff in Error, vs. The State of South Dakota. Filed January 30th, 1918. File No. 26,305.

Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

No. 838

W. E. CAREY, PLAINTIFF IN ERROR,

vs.

STATE OF SOUTH DAKOTA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
SOUTH DAKOTA.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

W. E. CAREY, PLAINTIFF IN ERROR,

vs.

STATE OF SOUTH DAKOTA, DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff in error was charged with having (1) on November 19, 1915, shipped wild ducks from Armour, South Dakota, by express, to Charles Comiskey, at Chicago, Illinois, in violation of a law of South Dakota, enacted March 8, 1909, and now found as Chapter 240 Session Laws of that year. The accused contended that this act of the legislature of South Dakota had been abrogated by the Federal migratory game bird law, approved March 4, 1913 (37 St. at L. 847), and in accordance with the practice of South Dakota, after the jury was empanelled (2) the accused objected to the introduction of any evidence against him upon such charge, because:

First. That the facts stated in the information are insufficient to and do not constitute a public offence against the laws of this State.

Second. That the act of Congress of 1913 has placed all migratory game birds under Federal protection and has thereby repealed all state laws theretofore existing with regard to the same.

Third. That such act expressly provides that only the laws that were in force as to non-migratory birds should remain in force and gave the State power to enact laws in the future with regard to migratory birds, after the Department of Agriculture should provide, by suitable rules and regulations, for carrying the act of Congress into effect.

Fourth. That no such power has been exercised by the Legislature of South Dakota since the Federal Game Law took effect.

Which objection was overruled by the court and to which ruling Defendant duly excepted.

The State having introduced evidence tending to show such shipment, and rested, the accused asked the court to advise the jury that under the evidence no offence against the laws of South Dakota was shown to have been committed, because the law of the State, so far as it attempts to prohibit the shipment of game, if it ever

had any validity, was abrogated by said act of Congress. This motion having been denied and exception taken, the accused was convicted. Appeal therefrom was properly taken (3) to the Supreme Court of South Dakota, where the same questions of law (4) were again presented. The Supreme Court rendered a decision (6) affirming the action of the trial court, holding that the law of South Dakota was in force, regardless of such act of Congress. From this decision the question is brought here by writ of error.

SPECIFICATION OF ERRORS.

The errors which we specify and upon which we rely, are the same as those upon which (9) the writ of error was issued, as follows:

(1) That by the information filed against this defendant in this action and upon which he was placed on trial, he is accused with having on the 19th day of November, 1915, in Douglas County, South Dakota, shipped and caused to be conveyed and transported by common carrier from a point within the State of South Dakota to a point without the State of South Dakota, fifteen wild ducks.

(2) That said information is based solely and only upon, and is alleged to be in violation of, Chapter 240 of the Session Laws of South Dakota, 1909, which was passed and approved on March 8th, of that year.

(3) By Act of Congress Approved March 4th, 1913 (37 Stat. L. 847), Congress assumed exclusive jurisdiction over this class of migratory birds, allowing the states to legislate alone on non-migratory birds, and to *subsequently* adopt laws to render more effective regulations thereafter to be adopted by the Department of Agriculture, and thereby suspended all state laws upon said subject, and especially said Chapter 240 of the Session Laws of 1909, of South Dakota.

(4) That at the time as mentioned in said information, when this defendant is accused of having committed a crime against the laws of the State of South Dakota, the Department of Agriculture had in accordance with said Act of Congress, duly prepared regulations and caused the same to be engrossed and approved by the President of the United States, to the effect that it was lawful to hunt and kill wild duck in the territory covered by the State of South Dakota during all of the month of November of said year.

(5) That since said regulations by the Department of Agriculture relative to game birds, including wild duck, became operative, the State of South Dakota has enacted no laws to aid in rendering same effective and has passed no laws other than those above mentioned in these assignments.

(6) That the Circuit Court of Douglas County, being the Court before which this action was originally tried, erred in holding said

information charging the defendant with the commission of a public offence and in refusing to sustain his objections made thereto, and to discharge him from further proceedings thereunder.

(7) That the Supreme Court of this State erred in affirming the conviction of this defendant in the trial court and in refusing to reverse the judgment of said court and grant him his liberty.

STATUTES APPLICABLE.

South Dakota Laws.

Chapter 240, Laws S. D. 1909, creates the office of game warden, and, among other things applicable to this case, provides:

"Section 19. No person shall at any time, or in any manner, acquire any property in, or subject to his dominion or control, any of the birds, animals, or fish, or any part thereof, of the kind herein mentioned (wild ducks), but they shall always and under all circumstances be and remain the property of this State, except that by killing, catching or taking the same in the manner provided by law, and for the purposes herein authorized, and during the period when their killing is not prohibited, the same be used by any person, at the time, in the manner, and for the purpose expressly authorized by law.

Section 21. No person shall at any time catch, take or kill any of the birds or animals mentioned in this chapter, in any other manner than by shooting them with a gun, held to the shoulder of the person discharging the same.

"Section 29. No person shall hunt, take, kill, ship, convey or cause to be shipped or transported by common or private carrier, to any person, either within or without the state, expose for sale, sell to any one, have in possession with intent to sell, or have in possession or under control at any time, any * * * wild duck of any variety, or any variety of aquatic fowl whatever, except * * * that wild duck of any variety may be killed and had in possession between the tenth day of September and the tenth day of April following * * * but no person shall in any one day take or kill more than twenty ducks.

"Section 30. Every *resident* of this state is prohibited from hunting, taking, or killing any game bird, or game animal, unless he shall have first procured a license therefor as provided in this act. Every county treasurer shall, upon application, issue to such person, under his seal, upon blanks to be furnished him by the State Game Warden, a license to hunt game animals and game birds within this State, upon payment to him of a license fee of *one dollar*, which license shall expire on the thirtieth day of June following its issuance.

"Section 31. Every person *not a resident* of this State is prohibited from hunting, taking or killing any game bird, unless he

shall have first procured a license therefor from a game warden or county treasurer. * * * Said game warden or county treasurer shall, upon application, issue to any non-resident a license to hunt * * * game birds, upon the payment of a license fee of *fifteen dollars*, which license shall expire on the thirtieth day of June following its issuance."

Federal Migratory Game Act.

On March 4, 1913 (37 St. at L. 847) Congress enacted as follows:

"All * * * wild duck * * * and all other migratory game and insectivorous birds which, in the northern and southern migrations pass through or do not remain permanently the entire year within the borders of any state or territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereafter provided for."

Then follows a provision allowing the Department of Agriculture to establish proper regulations, after which the Act continues:

"Provided, however, that nothing herein contained shall be deemed to affect or interfere with the local laws of the states and territories for the protection of *non-migratory* game or other birds, resident and breeding within their borders, nor to prevent the states and territories from enacting laws and regulations to *promote and render efficient* the regulations of the Department of Agriculture provided under this statute."

ARGUMENT FOR PLAINTIFF IN ERROR.

It will be noted from the foregoing statement that Section 19, of Chapter 240, Laws 1909 S. D., places the title of the birds in question in the State of South Dakota; Section 30 requires a resident hunter to pay one dollar for a license; Section 31 assesses a non-resident, for the same license, fifteen dollars, and Section 29 prohibits any person from hunting such game, except within a limited period, by parties having procured such license, and absolutely prohibits any person from shipping or conveying by common or private carrier, to any person within or without the State, or from selling or having in possession with intent to sell, any such birds or animals.

It will be noted that in the last part of the Federal migratory game act it is expressly provided that local laws of the states, for the protection of non-migratory birds, remain in force. *Expressio unius est exclusio alterius*. Migratory game laws of the respective states are accordingly suspended. It was probably unnecessary to insert this provision as to non-migratory birds, which we think, in

any event, remain under the control of the State, and was only done as a precautionary measure. It is, we believe, elemental that when Congress spoke on a matter within its jurisdiction, the voices of the respective states became mute. You will also notice that the acts of Congress possesses no power until the Department of Agriculture provides rules and time for its operation, all of which has been done. Congress then, by the last few lines, provides that nothing will prevent a state from *enacting laws* to promote the regulations of the Department of Agriculture, and render the same efficient. This must mean that after the Department of Agriculture has propagated such rules, then the State Legislature may aid in enforcing them. It does not mean that migratory game laws theretofore in force in the respective states should be continued in force. If such were the case, Congress could have easily said so. In fact, the act of Congress shows a purpose, in express terms, to take over and unify this subject, then to allow the states to aid in enforcing such uniformity—nothing more. When the Federal Government took control of the “custody and protection” of migratory birds, and provided the means by which they could, under certain conditions, be hunted and procured, it assumed and had the sole and only power to determine what should be done with the fruits of the chase. Prior to the enactment of Congress, the legislature of South Dakota had, by sections 30 and 31 of such act, provided a different tax upon the resident and non-resident. We are led to believe that this provision was repugnant to the second section of the Fourth Article of the Federal Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

Ward v. Maryland, 12 Wallace, 418.

Walling v. Michigan, 116 U. S. 446.

Robbins v. Shelby County, 120 U. S. 492.

State v. Montgomery, 94 Me. 201; 47 Atl. 167.

Section 19 placed the title of migratory birds in the state. Section 21 relates to the kind of gun that may be used in hunting. Section 29 prohibits any conveyance within or without the state by common or private carrier. The act of Congress we believe clearly covers all these subjects, and left it to the Department of Agriculture, by its rules, to determine under what condition such game could be pursued, and certainly it was not the purpose of Congress to have these things under Federal jurisdiction, and then allow the State to nullify the whole proceedings. The Supreme Court of South Dakota we believe has, in its opinion, disregarded this proposition, and we respectfully ask that its action be reversed.

JOE KIRBY,
JOE H. KIRBY,
THOS. H. KIRBY,
Attorneys for Plaintiff in Error.

Sioux Falls, S. D.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1917.

No. 838.

W. E. CAREY, PLAINTIFF IN ERROR.

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STATEMENT OF CASE.

The defendant in error accepts the statement of the case made by plaintiff in error on pages 1 to 4 of his brief now on file herein, except that sections 19, 21, 30 and 31 of chapter 240, Laws of South Dakota for the year 1909, have no application to this case, nor has that portion of the argument of plaintiff in error wherein he undertakes to show that portions of the above enumerated sections of statute conflict with the act of March 4th, 1913, (37 St. at L. 847). The sole question involved in this case arises under section 29 of chapter 240, Laws of South Dakota for 1909, the material portions of which are as follows:

“No person shall hunt, take, kill, *ship, convey or cause to be shipped or transported by common or private carrier, to any person, either within or without the state,* expose for sale, sell to anyone, have in possession with intent to sell, or have in possession or under control, *at any time, any snipe, prairie chicken, pinnated, white-breasted or sharp-tailed grouse, partridge, ruffled grouse, Chinese, ring-necked or English pheasant, wild duck of any variety, wild goose of any variety, brant or any variety of equatic fowl whatever, or any part thereof,* except: that any snipe, prairie chicken, pinnated, white-breasted, sharp-tailed or ruffled grouse, woodcock, par-

tridge, upland and golden plover, may be killed and had in possession between the 10th day of September and the 10th day of October following, except as hereinafter provided; that wild duck of any variety, wild goose of any variety, brant, or any variety of aquatic fowl whatever may be killed and had in possession between the tenth day of September and the tenth day of April following."

Reference to the information upon which this prosecution was based, as set forth on page 1 of the transcript of record herein, shows that the offense charged consisted only in the violation of the specific portions of the above quoted section 29 which we have indicated by italics; the information charges that the accused, "Did unlawfully ship and convey and caused to be shipped and transported by common carrier to a point without the State of South Dakota fifteen game birds, viz: ducks as follows: On the said 19th day of November, 1915, the said Defendant, W. E. Carey, did unlawfully, at Armour, Douglas County, South Dakota, deliver to Wells Fargo and Company, at said City of Armour, for shipment fifteen game birds, viz: wild ducks, and billed the same to Charles Comiskey at Chicago, Illinois, which game birds were seized by a Deputy State Game Warden while in transit at Tripp, South Dakota, and said Wells Fargo and Company then and there being an Express Company and a common carrier of goods, contrary, etc."

It will be observed that the accused is not charged in this complaint with having hunted, taken or killed wild fowl within the prohibition of the statute; it will also be noted that the offense charged did not occur within the closed season for wild ducks as provided by the above quoted statute.

THE PORTION OF CHAPTER 240, LAWS OF S. D. 1909, UNDER WHICH THIS PROSECUTION WAS BROUGHT IS NOT IN CONFLICT WITH THE FEDERAL MIGRATORY GAME BIRD ACT.

Admitting for the sake of argument that the act of March 4th, 1913, known as the Federal Migratory Game Bird Act, is constitutional, and further admitting the elementary principle relied upon by plaintiff in error, to the effect that when

Congress has spoken on a matter within its jurisdiction the voices of the respective states become mute, still we contend that, as will appear from the foregoing statement of the case, there can be no conflict between that portion of the state law which covers this case and the federal statute. The opinion of Polley J. in the Supreme Court of the State of South Dakota, where the identical question now under consideration was squarely presented and decided, would seem to us to furnish a conclusive argument upon this point. The opinion is set forth in full on pages 6 and 7 of the transcript of record herein.

It seems to us too clear for argument that the prohibition in the South Dakota statute against the shipping of wild ducks (the act charged in the information in this case) does not come within the provisions of the Act of Congress. Under said Act of Congress migratory birds are placed within the custody and protection of the Government of the United States. Said Act is for the protection of game. The material portion of the South Dakota statute is not for the protection of game, but for the protection of the people of South Dakota against being deprived of their property rights in game after the game has been taken. That the people of the state have a property right in game within its confines is expressly ruled in *Geer vs. Connecticut*, 161 U. S. 519.

THE FEDERAL MIGRATORY ACT IS UNCONSTITUTIONAL.

The defendant in error contended in the Supreme Court of South Dakota, and renews its contention here, that the federal act in question is unconstitutional and void, for the reasons that the Constitution of the United States has not vested in Congress the power to legislate upon this subject; that the federal act is an unconstitutional interference with the police powers of the several states; and that the title to the exclusive control over wild game within their respective borders belongs to the several states.

It has been said that the Federal Migratory Wild Game Bird Act is the single instance in the legislative history of this nation and of its component states in which the exclusive power to control wild game within their borders is denied to

these states. The federal statute has been declared unconstitutional by at least two federal district courts and by the Supreme Court of the State of Maine.

United States vs. McCullagh, 221 Fed. 288.

United States vs. Shawver, 214 Fed. 154.

State vs. Sawyer, 94 Atl. 886; L. R. A. 1915 F. 1031.

In each of the above named cases an attempt was made to sustain the federal statutes under the Commerce Clause of the United States Constitution, and under what is known as the General Welfare Clause, but it was held in each case that the law could not be sustained.

THE STATES HAVE THE TITLE AND EXCLUSIVE POWER OF CONTROL OVER WILD GAME.

It has been established by a long line of decisions of courts in this country that the states have the title to and the exclusive power of control over wild game coming within their respective borders.

Ward v. Race Horse, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244;

Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140;

In re Deininger (C. C.) 108 Fed. 623;

The Abby Dodge 223 U. S. 166, 32 Sup. Ct. 499, 56 L. Ed. 390.

Commonwealth v. Savage, 155 Mass. 278, 29 N. E. 468;

Organ v. State, 56 Ark. 270, 19 S. W. 840;

State v. Geer, 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804;

State v. Northern Pacific Express, 58 Minn., 403, 59 N. W. 1100;

State v. Rodman, 58 Minn., 393, 59 N. W. 1098;

American Express Co. v. People, 133 Ill., 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641;

Ex Parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129;

People v. Collison, 85 Mich., 105, 48 N. W. 292;

State v. Heger, 194 Mo., 707, 93 S. W. 252;

State ex rel v. Warner, 197 Mo., 650, 94 S. W. 962;

State v. Weber, 205 Mo. 36, 102 S. W. 955, 10 L. R. A.

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State v. Repp, 104 Iowa, 305, 73 N. W. 829, 40 L. R. A.
687, 65 Am. St. Rep. 463;
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901.

STATE STATUTE REGARDING SHIPMENT OF GAME
DOES NOT CONFLICT WITH INTERSTATE COM-
MERCE CLAUSE OF FEDERAL CONSTITUTION.

It has been established by the decisions of the United States Supreme Court and of other courts, that a state statute prohibiting the shipment of game from a state does not conflict with the interstate commerce clause of the Federal Constitution.

Geer vs. Connecticut, 161 U. S. 519; 40 L. Ed. 793; 16
Sup. Ct. Rep. 600;
Eager vs. Jonesboro, Etc. Express Co., (Ark.) 147 S.
W. 60;
Covington vs. Conn., 154 U. S. 209.
New York ex rel Silz vs. Hesterberg, 211 U. S. 31, 29
Sup. Ct. Rep. 10;
New York ex rel Silz vs. Hesterberg, 76 N. E. 1032; 3
L. R. A. (U. S.) 163.

In view of the foregoing we respectfully ask that the decision of the court below be in all things affirmed.

CLARENCE C. CALDWELL,

Attorney General of South Dakota,

and

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EDWIN R. WINANS,

Assistant Attorneys General of South Dakota,

Attorneys for Defendant in Error.